United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7148

To Be Argued By
LEONARD M. WEINTRAUB

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7148

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MICHAEL SALOUKAS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, Police Commissionet
of The City of New York,

Defendant-Appellee.

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On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR APPELLANT MICHAEL SALOUKAS

UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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MICHAEL SALOUKAS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, Police Commissioner of The City of New York,

Defendant-Appellee.

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BRIEF FOR APPELLANT MICHAEL SALOUKAS

Preliminary Statement

Appellant appeals from appellee's cross motion for summary judgment which was granted by the Hon. Thomas P. Griesa and docketed on March 14, 1977.

On October 17, 1975, the appellant commenced a civil action in essence to declare the action of the appellee unconstitutional and to restore the appellant to his rightful position as a policeman on the Police Force of the City of New York. The parties agreed that there existed no issue of fact and that only

law issues were involved in said case.

Justice Greisa held the following:

> Summary judgment must be granted dismissing the complaint. The authorities are clear that acquittal in a criminal action is no bar to an administrative proceeding such as occurred here within the Police Department. Also, the state court action is res judicata, and thus a bar to the present federal action.
>
> The action is dismissed.

STATEMENT OF FACTS

On August 30, 1971, the appellant (a New York City Policeman) was indicted by a Federal Grand Jury in the Eastern District of New York and was charged with the following two (2) counts:

1. Conspiring to sell counterfeit money;
2. Sale of counterfeit money.

Appellant was tried and acquitted by a jury after a six (6) day trial in which he took the witness stand and testified in his own behalf. The verdict of not guilty on both charges was rendered in the United States District Court of the Eastern District of New York on September 28, 1972. The Honorable John F. Dooling, Jr. presided.

Subsequently, the plaintiff went on trial to defend himself against "charges and specifications" by the Police Department of the City of New York, dated August 18, 1971, and September 17, 1971, respectively.

Notwithstanding the fact that the Departmental charges were numerous and diverse, the Department, through the Statement of its Hearing Officer, Deputy Commissioner Phillip R. Michael, stated at the hearing that his sole concern was the issue of the plaintiff's alleged passing of counterfeit money.

Dep. Comm. Michael:

> Just for the sake of the record, Mr. Schimmel brought to my attention some of the charges alleged as being off-duty for certain periods of time, and my statement to Mr. Schimmel was that those charges are not to be bothered with. That as far as I can see this case, the respondent is going to be found guilty of passing counterfeit or not, that's what the charges are concerned with, and the timing of the off duty or off post is really -- doesn't amount to anything. I'm not going to find him guilty of that and not of the others. Minutes of April 3, 1974 at 53,54 (Emphasis supplied).

The appellant's defense at the Federal and the Police Departmental trial was exactly the same, namely that whatever he did was for the exclusive purpose of effecting a lawful arrest of a certain notorious individual by means of acting undercover on his own.

Deputy Commissioner Michael found the appellant guilty on June 6, 1974, and pursuant to said verdict Michael J. Codd, Police Commissioner of New York City, signed a "Final Order of Dismissal" on July 16, 1974.

The Police Department's "Final Order of Dismissal" stripped Michael Saloukas of his property right to his job and

Badge after eighteen (18) years of service with a good record, together with his good name and reputation and all his rights, benefits, compensation and privileges which accrued to him during the eighteen (18) years of his employment.

On October 25, 1974, the appellant duly commenced an Article 78 proceeding pursuant to the New York Civil Practice Law and Rules (CPLR) in the Supreme Court of New York County. Said proceeding was transferred on consent to the Appellate Division, First Department of the Supreme Court on January 7, 1975. The Appellate Division unanimously dismissed the appellant's Article 78 CPLR petition on May 15, 1975 without opinion. On June 26, 1975, the Appellate Division denied appellant's motion for leave to appeal to the Court of Appeals, and on September 23, 1975, the Court of Appeals denied appellant's motion for leave to appeal to the Court of Appeals.

I

APPELLANT'S CIVIL ACTION IN THE UNITED STATES DISTRICT COURT IS NOT RES JUDICATA AS A RESULT OF A DISMISSAL OF AN ARTICLE 78 PROCEEDING PURSUANT TO CPLR IN NEW YORK WHERE THERE WAS NO ORAL OR WRITTEN OPINION.

The appellant, through the procedural right of an Article 78 (CPLR) proceeding (Nature of writ of mandamus), commenced a proceeding in Supreme Court pursuant to said statute to upset the Police Departmental decision of Commissioner Michael J. Codd, Police Commissioner of the City of New York, in accordance with the following statute and section:

CPLR #7803, Subdivisions 3 and 4, which sections read as follows:

> 3. whether a determination was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination was made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. (Emphasis supplied)

The gravamen of the Article 78 (CPLR) petition (forty nine [49] pages and five [5] exhibits) and memorandum of law, was supportive of the appellant's position that the decision of the Police Commissioner was not supported by substantial evidence as adduced at the Police Departmental trial. Appellee's Exhibits "A" and "B" attached to his motion papers for summary judgment are documentary proof of the foregoing posture of the Appellant's Article 78 proceeding.

The only point that counsel on both sides argued before the Appellate Division (First Department) of the Supreme Court was the factual issue of whether or not there was substantial evidence presented at the Police Departmental trial to justify, warrant and satisfy the conclusion reached by the Police Commissioner pursuant to New York Law to legally sanction the dismissal from the Police Department of the petitioner.

The Appellate Division unanimously dismissed the Article 78 petition without an oral or written opinion. No one but the five (5) sitting justices knows the legal and/or factual basis for the dismissal of the petition.

The appellant in said Article 78 proceeding alluded to constitutional issues in his petition and memorandum of law. It was asserted collaterally as part of the framework of the entire structure, but was neither a part of the jugular vein of the petition nor so intended.

There is absolutely no device, method or means by which reasonable learned men can ascertain, determine or conclude with any certitude or definitiveness that the dismissal of the Article 78 petition turned and was resolved on a federal constitutional issue in the courts of the State of New York.

If a reasonable doubt exists as to the above, I respectfully request that the Court favorably resolve said doubt in favor of the appellant as the issues involved herein are very basic and substantial constitutional rights which are crucial and critical to the life, existence and future of the plaintiff and his family.

Appellant is not seeking damages, profit or satisfaction, but only equitable relief so that he can be restored to the Police Department together with whatever he would be entitled to based on a wrongful interpretation of the law, and together with the restoration of his dignity, good name and

honor so that his family and appellant can live proudly after being acquitted by a federal jury of a crime he did not commit.

In Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir. 1973) Cert. Den. 419 U.S. 1093, the exclusive and sole legal issue in the state court was the constitutionality of a New York City ordinance in which the appellant was criminally convicted. This above issue of constitutionality was precise, clear and obvious. The Federal Court articulated that this issue was already fully litigated and adjudicated in the state court and thus was barred in Federal Court by res judicata.

The present issue of law before this Court cannot be asserted with any judicial certainty to have been decided in the state court. If a conjecture is in order (based on all the facts enumerated) a conclusion could logically be justified in stating that the Appellate Division determined that the Police Departmental trial heard sufficient evidence to support the standard required by the New York statute in that there was substantial evidence and that the Police Commissioner's decision was not arbitrary and capricious or an abuse of discretion.

Mr. Justice Moore in Thistlethwaite v. City of New York, supra, enunciated the following:

> However, it is quite clear that the gist of the current suit is that the regulations are unconstitutional; it is also clear that this question was at issue and determined against the appellants in the state action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the

> whole regulatory system was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered. Id. 341, 342. (Emphasis supplied)

See Fay v. Noia, 372, U.S. 391, 83 S. Ct. 822 (1963)

It is respectfully submitted to this Court that the appellant's case presently before this Court can be clearly distinguished, delineated and separated from Thistlethwaite v. City of New York, supra, in that the main thrust, element and issue of the appellant's case when in state court was a legal issue as specified in the Civil Practice Law and Rules of the State of New York and not a broad based federal constitutional issue as asserted by appellee.

The Supreme Court of the United States, in deciding to grant a writ of certiori, must decide that a federal question has arisen in the state court and adjudicated. The Court, however, often dismisses, without resolving an ambiguity, in the view that if the judgment below might have rested upon a nonfederal ground, the petitioner or appellant has not sustained the burden of establishing jurisdiction. Klinger v. Missouri, 13 Wall 257 (U.S. 1871); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); Stembridge v. Georgia, 343 U.S. 541 (1952); Durley v. Mayo, 351 U.S. 277 (1956); C.F. Black v. Cutter Laboratories, 351 U.S. 292 (1956). Also see Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965). Also see 62 Colum.

L. Rev. 822, 850 (1962) on Supreme Court review on ambiguous grounds.

II

A CIVIL ACTION AFTER AN ACQUITTAL ON THE SAME CHARGE IS A VIOLATION OF DOUBLE JEOPARDY, RES JUDICATA AND COLLATERAL ESTOPPEL.

In Helvering v. Mitchell, 303 U.S. 391, 58 S. Ct. 630, 632 (1938), the defendant was acquitted on criminal charges of wilfully attempting to evade or defeat income taxes. He thereafter was sued on the same charges civilly by the government for his taxes together with a penalty of a 50% assessment. Even though the standard of proof differed in the civil suit as respect to the criminal case, the Court held that there was no bar to the civil action.

Mr. Justice Brandeis writing for the majority of the Court said:

> Where the objective of a subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. Murphy v. United States, 272 U.S. 630, 632, 47 S. Ct. 218)1926).

Since the standard of proof is less in a civil case than a criminal case wherein the same issue is tried, the verdict against a defendant is not invalid by means of the double jeopardy of the Fifth Amendment when the civil decision imposes

an assessment as in Helvering v. Mitchell, supra, since this is a civil remedy as so intended and not punitive.

Mr. Justice Brandeis wrote:

> Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.
>
> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original Revenue Law of 1789. Id. at 633.

In Coffey v. United States, 116 U.S. 436, 6 S. Ct. 437 (1886), the following was enunciated:

> [Y]et where an issue raised, as to the existence of the act of fact denounced has been denounced, has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on a subsequent trial of a suit in rem by the United States where as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in suit in rem . . . there could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of a civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. Id. at 440.

Chief Justice Warren wrote in the plurality opinion in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958), the following:

> [I]n deciding whether or not a law is penal, this Court has generally based its determina-

> tion upon the purpose of the statute. If the statute imposes a disability of punishment - that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered non penal if it imposes a disability, not to punish but to accomplish some other legitimate governmental purpose. Id. at 96.

Certainly it could be concluded that a civil trial following an acquittal after a criminal trial on the same points and fact pattern is eminently unfair, wrong and detrimental to a citizen. However, the Court distinguishes said cases using the criteria as to whether the penalty to be imposed upon a defendant is remedial or punitive in intent. If it is punitive, it is invalid based on double jeopardy. It is for the courts to delineate and determine in each case whether a penalty is remedial or whehter it is punitive.

In the following cases, the courts have held that the action was not essentially criminal. Passavant v. U.S., 148 U.S. 214 (1893); U.S. v. Zukor, 161 U.S. 475 (1896); Hepner v. U.S., 213 U.S. 103 (1909); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Chicago, B&Q Ry. Co. v. U.S., 220 U.S. 559 (1911); U.S. v. Regan, 232 U.S. 37 (1914); Grant Bros. Construction Co. v. U.S., 232 U.S. 647, 660 (1914); Murphy v. U.S., 272 U.S. 630 (1926); Various Items v. U.S., 282 U.S. 577 (1931); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932).

The appellant, if found guilty in the federal criminal trial of passing counterfeit money, would have been dismissed by the Police Department from the Police Force as a result of said

felonious act. After having been adjudicated not guilty, he was then subjected to essentially a criminal trial because the verdict of guilty in the Police Departmental trial was consonant with a punitive, "criminal" and devastating sanction.

In a double jeopardy type case, the Court upheld the legality of an informer's action for treble damages subsequent to a criminal prosecution. The Court said that although the statute provided for both types of proceedings, criminal and civil, the purpose of the informer's action was remedial. United States v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943).

The Court in the above cited case clearly distinguished between actions intended to vindicate the public justice, these were criminal in nature and, hence, subject to the double jeopardy as opposed to actions designed to protect the government from financial loss. The latter was remedial and, hence, civil in nature.

In Green v. United States, 355 U.S. 184, 78 S.Ct. 221 (1957) the Court enunciated the following philosophy underlying the double jeopardy clause:

> [T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Id. at 233.

In Rex Trailer Company v. United States, 350 U.S. 148, 76 S.Ct. 219 (1956), the defendant was sued for civil damages by the government after a prior pleading of Nolo Contendere to a five-count indictment based on the same transactions and paid fines assessed, the Court held that double jeopardy under the Fifth Amendment was not applicable because the liquidated damage provisions of the statute were reasonable and not to be regarded as penalties, and are, therefore, civil in nature. The Court referred to United States v. Hess, supra.

When a defendant is acquitted in a prior criminal charge and a subsequent civil action is initiated for forfeiture of merchandise based on the same charges as previously adjudicated then collateral estoppel would be a valid defense, except where the element of the claim is different than the prior criminal case. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S.Ct. 489 (1972).

In the above case, intent was an essential element in the criminal case of smuggling articles into the United States while this prerequisite was not a necessary ingredient in the civil litigation of forfeiture.

The Police Departmental trial of the appellant did not have as its purpose any compensation to the City of New York or to the Police Department for the act that appellant was accused of committing. Rather, the motive and intent was to severely punish this police officer and, because of this, to make him "Run the Gantlet" a second time. (Quote, Ashe v.

Swenson, 90 S. Ct. 1189 (1970).

Robert S. Hunter in his book "Federal Trial Handbook" stated on page 196 in respect to "collateral estoppel" the following:

> Collaterial estoppel is an awkward phrase that stands for an extremely important principle in our adversary system of Justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since the Supreme Court's decision in United States v. Oppenheimer (1916) 242 US 85, 37 S.Ct. 68.
>
> This principle is fully applicable to a former judgment in a criminal case. The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of the 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Ashe v. Swenson (1970) 397 US 436, 90 S.Ct. 1189.
>
> In the application of the doctrine of collateral estoppel, the question is not whether a state could validly charge a defendant with several different offenses for crimes that happened more or less simultaneously, or whether the defendant could have been convicted

> in a single trial of several different crimes that happened more or less simultaneously. It is simply whether, after a jury determined by its verdict that the defendant was not guilty as to one such crime, the State could constitutionally hail him before a new jury to litigate that issue again. When a straightforward application of the doctrine leads to the conclusion that the jury found that the defendant was not one of the criminals involved in the alleged crime, a second prosecution for crimes arising out of the same event is wholly impermissible. Ashe v. Swenson, supra. This rule is embodied in the Fifth Amendment guarantee against double jeopardy, and is binding upon the states. Ashe v. Swenson, supra.

It is strongly arguable that the Police Departmental trial, to which the appellant was subjected, was criminal or quasi-criminal and not civil even though the standard of proof was not "beyond a reasonable doubt." The penalty and exposure to which the appellant found himself as a result of the unfavorable decision was virtually as catastrophic, severe and damaging as if he were found guilty in the federal criminal case. The Police Department verdict was punitive and offensive punishment by way of dismissal, loss of pension, deprecation of his name and reputation rather than a fine, suspension or censure. This punishment has all the characteristics of strict criminal punishment which can be differentiated from damages in a civil case.

The American rule of fundamental fairness is a tradition that cannot and should not be eroded. It is an impregnable right that must be guarded and protected most strenuously by the courts. The appellant and government had their "day in court";

the appellant was completely vindicated under the strictest of standards. To allow the Police Department, or any subdivision of federal, state and city government, to re-try, re-litigate and re-evaluate an already final issue of a sovereign governmental body is to give countenance to a tangential, oblique and subtle position which would have no legal right or stanidng if a direct arm of government instituted said proceeding.

It was stated in U.S. v. American Honda Motor Co., 273 F.Supp. 810 (1967), the following:

> That Honda having been prosecuted and convicted for violating Section 1 of the Sherman Act in Los Angeles proceedings, may not again be charged in Chicago with Section 1 violation for activities which were part of a single national conspiracy to maintain prices of its product throughout the United States and which were part of the national conspiracy involved in the Los Angeles case. The prohibition of the Fifth Amendment against double jeopardy cannot be evaded by fragmentation. (Underscoring supplied) Id. at 819.

Without the fundamental right of double jeopardy as a constitutional right of an individual, there would not be anything to prevent a third or fourth trial, ad infinitum. The underlying principle, that is deeply ingrained in the Anglo-American system of jurisprudence (which has its genesis in ancient Greek and Roman Law) is that the sovereign power with all its resources and power should not be permitted and allowed to make repeated attempts to convict and harass an individual for an alleged offense, thereby subjecting him to ordeal, embarrassment,

expense, and compelling said party to live in a continuing state of anxiety, insecurity and fear, as well as enhancing the possibility that even though djudicated not guilty, he may ultimately be found guilty. In Breed v. Jones, 95 S.Ct. 1779 (1975), the Court said:

> He was twice forced to marshall defense and twice subjected to the heavy personal strain that such an experience represents.

In the State of New York, in Grand, Inc. v. City of New York, 32 N.Y.2d 300, 344 N.Y.S.2d 938 (1973), it was clearly stated that the prior conviction is conclusive proof of the same facts necessarily implicated in the subsequent civil litigation provided that a full and fair opportunity had existed to contest the issues in the criminal proceeding. Also, in Vavolizza v. Kreiger, 33 N.Y.2d 351, 356, 352 N.Y.S.2d 919 (1974), the two requirements for the use of collateral estoppel - the identity of the issues and the prior opportunity to meet the issues - were reaffirmed.

The Matter of McGrath v. Gold, 36 N.Y.2d 406, 411, 369 N.Y.S.2d 62 (1975),held that "Collateral estoppel means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 445, 90 S.Ct. 1189 (1970); See People v. Cunningham, 62 Misc.2d 515, 519, 308 N.Y.S.2d 990 (1970).

The doctrine of collateral estoppel was applied to bar a litigant from pursuing a remedy as in Vavolizza v. Kreiger, supra,

and Grand, Inc. v. City of New York, supra.

Collateral estoppel can aid a litigant in pursuing a remedy as articulated in Read v. Sacco, 49 App. Div.2d 471 (1975):

> The reason underlying the use of estoppel is the need for the stability of judgments and the economy of judicial time, which emerge from the concept that, once fairly tried, an issue resolved should not be subject to retrial. Nevertheless, in every case the question of fairness - an inherent element of due process - in the application of the doctrine must be the crowning consideration. (cf. O'Connor v. O'Leary, 247 Cal. App. 2d 646) Id. at 473-74.

Fairness implies that the litigant in the prior proceeding had full opportunity to contest the decision invoked against him. Schwartz v. Public Administrator of County of Bronx, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955 (1969).

Mr. Justice Shapiro of the Second Department of the Appellate Division of the Supreme Court of New York wrote extensively of the principle of collateral estoppel in the case of Vincent v. Thompson and Parke, Davis & Company, 50 App. Div.2d 211, 216, 217 (1975). He articulated the following:

> The doctrine of collateral estoppel stems from the doctrine of res judicata, at the core of which is the idea that society's interests are better served by foreclosing repetitious litigation than by permitting litigants to show that the truth is otherwise than as found or assumed in a prior action. Collateral estoppel falls into the category of partial res judicata because its binding effect is limited to certain of the issues formerly in dispute, rather than extending to the entire controversy. When collateral estoppel operates, certain questions actually litigated and determined in one

> action are precluded from relitigation in a later action when the same questions arise anew, even in a suit on a different cause of action. Rosenberg, Collateral Estoppel in New York, 44 ST. JOHNS L. REVIEW 165, 166.

Cases standing for the preposition that base lines of collateral estoppel are the elimination of repeated litigation and the consistency of justice are the following. Bernhard v. Bank of American National Trust & Savings Assn., 19 Cal.2d 807, 122 P.2d 892 (1942); Israel v. Wood Dolson, 1 N.Y.2d 116, 151 N.Y.S.2d 1 (1956); Zdanok v. Glidden Co., Durkee Famous Foods Division, 327 F.2d 944 (2d Cir. 1964); Blonder-Tongue Labs., v. Univ. of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971).

In Illinois in 1974, the court held in People v. Grayon, 319 N.E.2d 43, that when a defendant is charged with a crime while on probation and is tried, and acquitted on said charge, the principle of collateral estoppel bars use of the same evidence at a probation revocation proceeding.

The case of Zdanok v. Glidden Co., supra, further elucidated the point of law that when litigants have once battled for the court's decision, they should neither be required, nor without good reason be permitted to battle for it again. "Finality" for purposes of collateral estoppel may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no good reason or sense for permitting it to be litigated again.

In United States v. Nash,447 F.2d 1382 (4th Cir. 1971) and United States v. Drevetzki, 388 F.Supp. 403 (N.D. Ill. 1972),

the courts held the issue decided by the jury in the prior case was crucial and once adjudicated, its re-determination in a trial for another offense is estopped.

It was held in United States v. Gugliaro, 501 F.2d 68, 70 (2nd Cir. 1974):

> If an issue of ultimate fact has once been determined by a final judgment in a criminal case, the same issue cannot be relitigated between the same parties in a later prosecution. The court cited Ashe v. Swenson, supra, and United States v. Zane, 495 F.2d 683 (2d Cir. 1974).

The Supreme Court of the United States held in Harris v. Washington, 404 U.S. 50, 92 S.Ct. 183 (1971) that when an ultimate issue of the identity of the person who mailed the package containing a bomb which exploded and killed two persons and injured another was decided by a jury in the first state court trial in which petitioner was acquitted of murder of one of the victims, the constitutional guarantee against double jeopardy was applicable irrespective of whether the jury considered all relevant evidence and irrespective of good faith of state in bringing successive prosecutions, and prosecutions for murder and assault with respect to other victims of the explosion were barred.

Mr. Justice Learned Hand noted in Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944) Cert. Denied, 323 U.S. 720:

> It is of course well settled law that a fact, once decided in an earlier suit, is conclusively established between the parties (or their privies) in any later suit, provided it was necessary to the result of

> the first suit. (See People ex Rel. McCanliss v. McCanliss, 255 N.Y. 456).

Mr. Justice Cooke of the Court of Appeals of New York, in McGrath v. Gold, supra, recognized and accepted the principle of collateral estoppel as enunciated in Ashe v. Swenson, supra, and stated that although collateral estoppel as an aspect of the broader doctrine of res judicata, was originally developed in connection with civil litigation (Hoag v. New Jersey, 356 U.S. 464 (1958); See United States v. Oppenheimer, supra) it is also applicable in criminal cases (Yates v. United States, 354 U.S. 298 (1957); People v. LoCicero, 14 N.Y.2d 374, 251 N.Y.S.2d 953 (1964); People v. Dreares, 15 App. Div.2d 204, 221 N.Y.S.2d 819 (1961), Aff'd 11 N.Y.2d 906.

The Court, in McGrath v. Gold, supra, also stated that:

> The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage and is applicable to the States through the Fourteenth Amendment (Benton v. Maryland, 395 U.S. 784, 794) Id. at 64.

In the matter of Travis Stanley Levy v. The Association of the Bar of the City of New York, 37 N.Y.2d 279 (1975), the appellant, an attorney, was precluded from introducing testimony during a disciplinary proceeding on the question of his innocence of the federal criminal offense for which he had been convicted as it could not be relitigated.

The Court of Appeals held "that under familiar principles of collateral estoppel the attorney is precluded from relitigating the issue of his guilt." Id. at 280.

The Court further stated:

> The doctrine of collateral estoppel is applicable to criminal proceedings (Matter of McGrath v. Gold, 36 N.Y.2d 406, cf. Vavolizza v. Krieger, 33 N.Y.2d 300). We perceive no reason why a member of The Bar should be a-corded a significantly more favored position than are others in the application of this principle, particularly in a matter in which the public interest is at stake. Additionally, as a matter of common justice, it cannot be said to be unreasonable or unfair to preclude the attorney from relitigating an issue when precisely the same issue has been resolved against him in another proceeding to which he was a party in which the standard of proof called for the highest quantum -- beyond a reasonable doubt (cf. Matter of Lynch, 427 App. Div. 477, 480) -- and in which rigorous safeguards were imposed to insure against an unjust conviction (S.T. Grand, Inc. v. City of New York, supra, at 304). Id. at 281.

The appellant submits that if a respondent in an administrative proceeding before the Bar Association of the City of New York is precluded from litigating an already decided judicial determination, then fundamental fairness, righteousness and correctness would equally prevent and also preclude an administrative proceeding by the Police Department from litigating for a second time an issue that was decided by a jury in a "not guilty" verdict based on the same fundamental principle of "COLLATERAL EXTOPPEL."

III

THE APPELLANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED IN THAT HIS PROPERTY RIGHT IN MAKING AND EARNING A LIVELIHOOD WAS VIOLATED.

In Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427 (1897), the Court wrote:

> [T]he "Liberty" mentioned in that [the 14th] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . . . Id. at 431.

In Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct.7 (1915), the Court stated the following:

> [I]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure . . . . Id. at 10.

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), held that where appellant's good name, reputation, honor or integrity is at stake or the state in declining to reemploy him, imposed on the appellant a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he may claim a deprivation of liberty under the due process clause of the Fourteenth Amendment.

The Court in Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113 (1972), gave further credance that rights in property are basic civil rights under 42 U.S.C. §1983 (1970) and to be protected under the Fourteenth Amendment.

The appellant's employment as a policeman for The City of New York for eighteen (18) years must certainly be construed as a property right which the appellant has a constitutional right to be protected and preserved under the Constitution of the United States.

CONCLUSION

The judgment below should be reversed and appellant's motion for summary judgment in the District Court be granted.

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Respectfully submitted,

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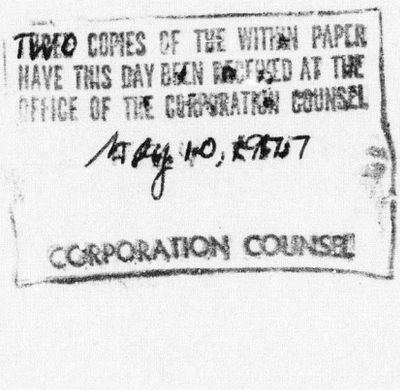
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